

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-4090

Signed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEVERINO R. NICO, JR. and
TERESITA V. NICO,

Appellants

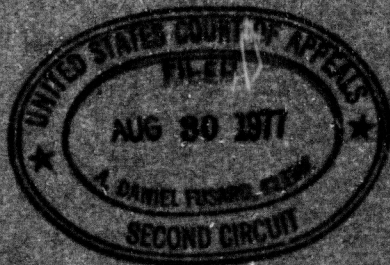
v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE



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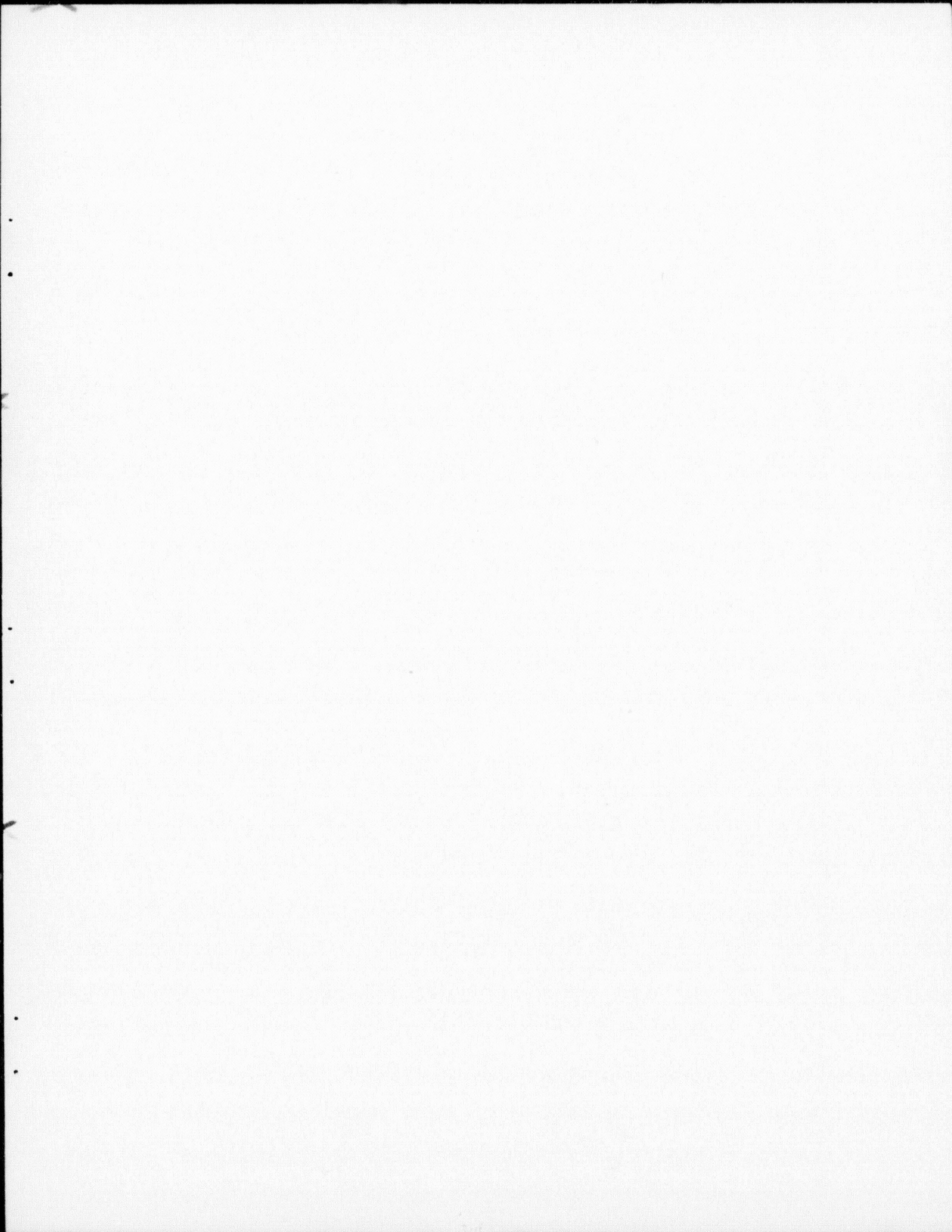


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BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Tax Court erred in holding that the taxpayers were not entitled to use a short tax year under the provisions of Section 443(a)(2) of the Code.
2. Whether the Tax Court erred in holding that taxpayers, having been nonresident aliens for part of the taxable year in issue, were barred by the provisions of Section 142(b)(1) of the Code from using the standard deduction for any part of that year.

3. Whether the Tax Court was clearly erroneous in concluding on the record evidence that the taxpayer had not, as of their departure from Manila, intended to make New York, rather than San Francisco, their new principal place of work and thus were not entitled to deduct their expenses of travel from Manila to San Francisco.

STATEMENT OF THE CASE

This appeal involves federal income taxes for the taxable year 1971 in the amount of \$150.92, in the case of Severino Nico, and \$303.81, in the case of Teresita Nico. (Op. 2.^{1/}) The findings of fact and opinion of the Tax Court (reported at 67 T.C. 647) was filed on January 10, 1977. The decision of the Tax Court was entered on January 11, 1977. Taxpayers' notice of appeal was timely filed on April 6, 1977. Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts pertinent to this appeal, as found by the Tax Court (Op. 2-5), are as follows:

Prior to May 1971, taxpayers were Philippine nationals. On April 23, 1971 they left Manila by plane for the United States. After stopovers in Taipei, Taiwan and Tokyo, Japan, they arrived in Honolulu on May 2, 1971. Two days later,

^{1/} On motion of taxpayers, the Court authorized the appeal to be heard on the basis of the original record. "Op." citations are to the opinion of the Tax Court.

taxpayers flew from Honolulu to San Francisco. They remained in San Francisco until August 29, 1971, at which time they left for New York City. (Op. 2-3.)

Sometime after their arrival in San Francisco, taxpayers received their alien registration cards which were mailed to them by the Immigration Office in Honolulu. On May 17, 1971, their personal belongings and clothing arrived by ship from the Philippines. While in San Francisco they also received several checks, two of which represented retirement contributions. The first of the retirement contribution checks, dated June 2, 1971, was for approximately \$500, and the second, dated June 30, 1971, was for approximately \$3,000. They also received two checks from their bank in Manila sometime before August 1971. These checks of approximately \$400 each represented their savings and the proceeds from the sale of their furniture in the Philippines. (Op. 3.)

Prior to leaving the Philippines, Severino R. Nico, Jr., ("Severino") had been employed as an attorney with the United States Veterans' Administration in Manila. Although a member of the Philippine bar, he was not admitted to practice in any jurisdiction in the United States. He left the Philippines with the intention of resuming employment with the Veterans' Administration in the United States once he had met the requirement that he be a member of the bar in a jurisdiction within the United States and a United States citizen.

Teresita V. Nico ("Teresita") had also been employed with the Veterans' Administration while in the Philippines. (Op. 3-4.)

After arriving in San Francisco, taxpayers stayed temporarily in a hotel. On May 6, 1971, they signed a four-month lease on a furnished apartment. Eight days later Teresita began work in San Francisco with California Blue Cross. Severino, unable to find work as a law clerk in San Francisco, took a temporary job with Anthony Enterprises. He left this position after two days, and on June 23, 1971, commenced employment with the State of California. Teresita resigned her position on August 14, 1971, and Severino resigned on August 23, 1971. (Op. 4.)

On August 29, 1971, taxpayers left San Francisco by bus for New York City, arriving there on September 6, 1971, where they both soon found employment. Teresita began work on September 14, 1971, and Severino began as a law clerk on October 14, 1971. (Op. 4-5.)

Taxpayers filed a purported joint income tax return for 1971, and adopted the calendar year as their accounting period. They deducted the travel expenses and temporary lodging and meal expenses incurred in their move from San Francisco to New York City, as well as their moving expenses incurred in the move from Manila to San Francisco. They used the standard deduction in computing their taxable income. (Op. 5.) In his notices of deficiency, the Commissioner disallowed in its entirety the moving expense deduction attributable to the move from

Manila to San Francisco, and also determined that petitioners were not entitled to file a joint return or elect the standard deduction because they were non-resident aliens for a part of the calendar year 1971. These are the issues before this Court.

SUMMARY OF ARGUMENT

I

Taxpayers were nonresident aliens without United States taxable income for the first four months of 1971, and resident aliens with taxable income for the remainder of the year. The Tax Court correctly held that their taxable year 1971 was the full calendar year and that, having been nonresident aliens during part thereof, they were ineligible, as provided in Section 6013 (a) (1) of the Code, to file joint returns or, as provided in Section 142(b) (1), to take the standard deduction.

1. Taxpayers err in contending that they were not non-resident aliens during their taxable year 1971, on the ground that Code Section 443(a) (2) allegedly provides that a taxpayer who was a nonresident alien for part of what would otherwise be his taxable year is required to use a short taxable period which excludes the period of nonresidency. The provision therein that the short period is to be used by a taxpayer who was not "in existence" for the full 12 month period does not cover nonresident alien status as a form of being not in existence. In dealing with the not "in existence" concept, the pertinent Treasury Regulations make it clear that it refers to such situations as a corporation prior to its organization or after its dissolution, or to an individual who has died before the end of his taxable year.

Taxpayers seek to make unwarranted use of the fact that the statutory provision in question employs the word "taxpayer" in referring to the persons who, if in existence for only part of the year, are to file a short period return. Having established that "taxpayer" is defined in the Code as a person "subject to any internal revenue tax," taxpayers then seek, without explanation or justification, to apply this as though it were the definition of "in existence". There is, in fact, no definition of "in existence" provided and the application of it in the Regulations is the most reasonable one.

While this question has not been extensively litigated, the cases which have passed upon it have adopted the Commissioner's position that the mere fact that a taxpayer is a nonresident for part of the year does not put him out of "existence" for that period and does not warrant use of a short tax period. We think it fair to observe that if it had been the intention of the Congress to cover a period of nonresidency as one of the bases for using a short tax year, it chose an incredibly unlikely form of expression in the term "in existence." The instant taxpayers, we submit, may not avoid the statutory bar against filing joint returns or use of the standard deduction by claiming the right to use a short tax year excluding their period of nonresidency.

2. Taxpayers' alternative contention, with respect to the standard deduction question--that the bar of Section 142(b) (1) (which recites that this option is not available to a "non-resident alien individual") does not apply to their income

earned in the part of the year during which they were residents-- fails to recognize the thrust and purpose of that provision. The right to use the standard deduction--and to enjoy an arbitrarily computed deduction greater than actual deductible expenditures during the year--is an act of legislative grace which carries with it the limitations imposed by the Congress. It was the intent to allow use of the standard deduction only in situations where the entire income which the taxpayer enjoyed during the taxable year is subject to United States taxation and where the taxpayer's liability is computed on the basis of the usual rules affecting United States taxpayers. Nonresident aliens were excluded because, apart from other potential deviations from the above, part of their income (that earned from non-United States sources during their period of nonresidency) would be exempt from United States taxes and because this would put them in a lower tax bracket, even with respect to the reportable portion of their income, than they would have been in had their full income for the year been cognizable for United States tax purposes.

Taxpayers' position to the contrary rests upon the same illusory notion of the meaning and impact of the term "taxpayer" as marks their position on the short tax year question. The statute prohibits use of the standard deduction by a "non-resident alien individual" (emphasis added), and not a nonresident alien taxpayer. Moreover, it is apparent from the language of the captions and headings in Section 142 that the denial of

the use of the standard deduction is intended to apply across the board to a given taxpayer and not merely, as taxpayers would have it, to some portion of that taxpayer's income for the year. The standard deduction is either available with respect to the taxpayer's entire year, and applied to all reported income, or it is not available at all. The instant taxpayers are in the latter situation.

II

The Tax Court found that the taxpayers had failed to prove that their intention, on their departure from Manila, was to travel to New York and to make that city, rather than San Francisco where they spent the first four months after arrival in this country, their principal new place of work. For that reason, the court held that they were not entitled to deduct their moving costs from Manila to San Francisco under the provisions of Section 217 of the Code. In attacking this finding, taxpayers fail to recognize the governing rules (1) that the burden of proof as to such fact is on the taxpayer and the mere absence of evidence (if that were the case) in support of the Commissioner's determination would not justify a decision for taxpayers, (2) that the finding in question is not to be reversed on appeal unless clearly erroneous, and (3) that the testimony of the taxpayer as to a matter of his intent (such as here) is not binding on the trier of fact which may reject it as not worthy of belief where it is not consistent with the objective circumstances reflected in the record or is inherently incredible.

The testimony of Severino that they stopped in San Francisco only because it was necessary to wait there for their belongings to arrive is so inherently improbable that the Tax Court was not obliged to accept it. Taxpayers have never asserted that they could not have had their belongings shipped directly from Manila to New York nor have they offered any explanation as to why they could not as readily have awaited them there as in San Francisco. Moreover, the record shows among other circumstances discrediting taxpayers' account, that the belongings arrived in San Francisco only a couple of weeks after their arrival there but they remained in that city for approximately another three months thereafter (during which time they were gainfully employed) before leaving for New York. The Tax Court's finding was not only not clearly erroneous but the only reasonable one under the circumstances.

ARGUMENT

I

THE TAX COURT CORRECTLY HELD THAT TAXPAYERS
WERE ENTITLED NEITHER TO FILE JOINT RETURNS
NOR TO USE THE STANDARD DEDUCTION

A. Introduction

Section 6013 of the Internal Revenue Code of 1954, Appendix, infra, makes provision for filing of joint returns by husband and wife, but Section 6013(a)(1) provides that this privilege shall not be available where "either the husband or wife at any time during the taxable year is a nonresident alien." Section 141 et seq. of the Code provides for the optional use of the standard deduction, but Section 142(b) provides that the option shall not be available in computing the taxable income of, among others, "a nonresident alien individual." Since taxpayers were nonresident aliens between January 1 and May 2 of 1971, if their taxable year 1961 encompassed the entire 12-month calendar year, the above provisions would bar them from filing joint returns and/or using the standard deduction in filing their returns for 1971. They seek to circumvent this disqualification, first, by contending that they are entitled to use a short tax year commencing May 2, 1977, and that because they were not nonresident aliens during this short tax year, they qualify, in making their return for that period, to file a joint return and to use the standard deduction. Alternatively, they contend, with respect to the standard deduction issue, that, even if their taxable year is the full 12 months of 1971, nonresident aliens

are permitted to use the standard deduction at least during the part-year (May 2, 1977 through December 31, 1977) during which they were resident aliens.

B. Taxpayers are not entitled to use a short tax year

Section 441(b)(3) provides that a taxpayer's taxable year shall be "the period for which the return is made, if a return is made for a period of less than 12 months." Taxpayers rely (Br. 9-10) on the provisions in Section 443(a)(2), which reads:

SEC. 443. RETURNS FOR A PERIOD OF LESS THAN
12 MONTHS.

(a) Returns for Short Period.--A return for a period of less than 12 months (referred to in this section as "short period") shall be made under any of the following circumstances:

* *

(2) Taxpayer not in existence for entire taxable year.--When the taxpayer is in existence during only part of what would otherwise be his taxable year.

* * *

They contend that they are required to file a short return for the period commencing May 2, 1977, since (they maintain) prior to that date they were not "in existence" for purposes of the above provision. Hence, they argue, they are entitled to file a joint return for their 1971 short tax year and to use the standard deduction since they were not nonresident aliens during any part of this period.

The answer, as held by the Tax Court (Op. 9-10), is that, within the meaning of Section 443(a)(2), taxpayers were in existence for the full period of calendar year 1971. In so holding, it relied (as taxpayers indicate (Br. 13)) upon its earlier holding to the same effect in More v. Commissioner, 66 T.C. 27 (1976) which, at the time taxpayers' brief was filed in this Court, was pending here on appeal as No. 76-4235. On June 24, 1977, this Court affirmed the decision of the Tax Court in More v. Commissioner by summary order.^{2/}

Taxpayers' position rests, in essence, on the apparent theory that status as a nontaxpayer under the definition of "taxpayer" set out in Section 7701(a)(14)--i.e., "any person subject to any internal revenue tax"--establishes also that the person is not "in existence" for purposes of Section 443(a)(2). This is untenable for a number of reasons. First, had Congress intended in Section 443(a)(2) to signify nontaxpayer status for a part of a calendar year as the basis for filing a short-year return, it could scarcely have chosen less appropriate language

^{2/} Although taxpayers refer (Br. 13) to the comment of the court below that the More taxpayers did not invoke Section 443(a)(2), it should be noted that the Tax Court in the More case took it into account sua sponte (66 T.C., pp. 30-31) and rejected the notion that being a nonresident alien constituted being not in existence for purposes of that provision. Moreover, taxpayers in More made reliance upon Section 443(a)(2) (in the same manner the instant taxpayers do) a major part of their position on appeal to this Court and the Commissioner consented to its being raised on appeal because the Tax Court had undertaken to pass upon the question, even though not raised by taxpayers in that court.

than that referring to being "in existence." We may assume that, if Congress had intended to require a short-period return based on nonresident alien status or nontaxpayer status, it would have said so simply and directly^{3/} and would not have left it to the public and the courts to play word games and to draw the improbable inference that being not in existence includes being a nonresident alien.

The true import of the term "in existence" is reflected in the Regulation under Section 443 (Treasury Regulations on Income Tax (1954 Code), Section 1.443-1(a)(2)) which provide examples of taxpayers who are deemed not in existence--i.e., corporations which have been organized after the beginning, or dissolved before the end, of a given tax year or individuals who are born after the beginning, or die before the end, of a^{4/} year.

A major flaw in taxpayers' position is that it rests on the assumption that the term "taxpayer" is used in Section 443(a)(2) as a definitional term and (see taxpayers' brief, p.10) as an integral part of a composite term "taxpayers in existence" as reconstructed by taxpayers. It will be noted that the

^{3/} Compare Section 6013(a)(1) which bars use of a joint return where either husband or wife was a nonresident alien.

^{4/} Note that Section 6013(a)(2), which bars joint returns where the spouses have different tax years, makes a special exception where the death of one spouse has (obviously under the provision of Section 443(a)(2)) resulted in his tax year ending before that of the other spouse.

statute does not in fact use the composite expression "taxpayer in existence" but speaks of a situation in which the taxpayer under consideration was in existence for only part of an otherwise taxable year. In fact the term "taxpayer" is used there instead of the broader term "person"--which could have been used as well--simply as an acknowledgment that the only persons who would have any interest in the provision of the section as to the period for which the return is to be made are those who are already established, by reference to other provisions of the Code, as having reportable income and thus as being subject to the requirement for filing a return (i.e., as taxpayers). Thus there is no reason to believe that the term "taxpayer" is used in Section 443(a)(2) as the line of demarcation between those required to file for a short period and those who are not and, in that event, its definition is not relevant to the issue at bar. The most that taxpayers may do with this definition is to substitute it for the word being defined--i.e., "taxpayer". Section 443(a)(2) would then read: "When the [person subject to internal revenue taxes] is in existence during only part of what would otherwise be his taxable year." This leaves the critical question--what is meant by "in existence"--still to be answered. What taxpayers have done, without so acknowledging, and without justification, is--having established a definition for "taxpayer"--to use it as the definition of the different term "in existence."

Section 7701 defines only "taxpayer"^{5/}--not "taxpayer in existence" nor "in existence". Therefore, whether the person seeking to determine if he is to use a full tax year or a short-tax period as the basis of his return is described as "taxpayer" or as "person subject to internal revenue tax", the question remains as to what factors will govern whether or not they were "in existence" for the full 12 month period.

The cases which have dealt with the general question raised here have concluded that an alien who is resident part of his taxable year and nonresident for the other part is a "dual-status" taxpayer who must use the same taxable reporting period he would have used had he been resident for the full year and that Section 443 does not provide for use of a short-tax period under those conditions. Simenon v. Commissioner, 44 T.C. 820, 832-833 (1965); Van Der Elst v. Commissioner, 223 F. 2d 771, 773 (C.A. 2, 1955); Klaas v. Commissioner, 36 T.C. 239, 242-243 (1961).

Taxpayers rely (Br. 11-13) upon Aguilar v. United States, 501 F. 2d 127 (C.A. 5, 1974) and Bunnel v. Commissioner, 50 T.C. 837 (1968), each being a case in which, in different contexts,

^{5/} Although, for the above reasons, it is not necessary to our position herein to challenge the applicability to the instant question of the definition of "taxpayer" in Section 7701(a)(14), we point out that, as noted by the Tax Court in Bunnel v. Commissioner, 50 T.C. 837, 841 (1968), Section 7701 itself states that the definitions therein provided need not be used slavishly where it would produce a result "manifestly incompatible with the intent" of the provision of the statute in connection with which they are sought to be used.

an entity (one a nonresident alien and the other a Subchapter S corporation) was held not to be a taxpayer. Taxpayers do not, however, offer to explain how these cases bear upon the particular and different question at bar. In Aguilar the Fifth Circuit observed (largely by way of dictum since we see no relevance to the issue there decided) that an individual who was a nonresident alien at all times, who did no business in the United States and who (the court concluded) had no income subject to United States taxation was not a taxpayer. We have no reason to quarrel with this and we fail to see how that conclusion has any bearing on the question as to whether such nontaxpayer status constituted being not in existence for purposes of Section 443(a)(2) or as to what the individual's tax year would have been had he qualified as a taxpayer (i.e., become subject to United States taxation) by having become a resident for part of the year.

In Bunnel, the Tax Court held that, in order to avoid a patently absurd and unintended result, the definition of "taxpayer" in Section 7701(a)(14) should not be applied super-literally. It concluded that, although the Subchapter S corporation was subject to certain internal revenue taxes, and was thus a taxpayer in the general sense, it was not the party subject to the taxes in connection with which the deficiency notice had been sent and thus was not "the taxpayer" to which such a notice must be timely sent in order to avoid the running of the limitations period. It thus held that the deficiency

notice, which had been timely sent to the stockholders who were the parties liable for the tax deficiencies being asserted, satisfied the requirements of Section 6212(a) of the Code. Again, we fail to see the relevance of this holding to the issue at bar. The question here is not whether the instant taxpayers were taxpayers (both parties agree that they were) but whether one who was not subject to United States taxation for a part of a year (and thus arguably not a taxpayer for that part under the definition of Section 7701(a)(14)) should, by virtue of that fact alone, be deemed not to have been "in existence" for that part of the year within the meaning of Section 443(a)(2).

Implicit in taxpayers' position is the proposition that a person's taxable year may never include any period during which he or she was a nonresident alien since Section 443(a)(2) would exclude that period from the taxable year. Yet the language of the very section of the statute which bars joint returns in the case of a nonresident alien husband or wife (Sec. 6013(a)(1)) is incompatible with that view. The critical language of Section 6013(a)(1) prescribes that "no joint return shall be made if either the husband or the wife at any time during the taxable year [emphasis added] is a nonresident alien." This provision obviously contemplates that the taxable year of the taxpayers can and will include a period of nonresident alien status. If taxpayers' reading of Section 443(a)(2) were correct, the provision would be meaningless because there could be no taxable year during

which a taxpayer was a nonresident alien^{6/}. Taxpayers were alive during all of 1971 and thus were "in existence" for the entire calendar year and cannot use a short tax period under the provision of Section 443(a)(2).

C. Taxpayers are barred from use of the standard deduction by Section 142(b)(1)

Taxpayers contend in the alternative that, even if they were not entitled to use a short tax year beginning May 2, 1971, they have the right to take the standard deduction in connection with the income earned in 1971 as resident aliens (i.e., after May 2, 1977) and reported on their return for that year. The relevant statute, Section 142(b)(1), provides, as follows:

SEC. 142. INDIVIDUALS NOT ELIGIBLE FOR STANDARD DEDUCTION.

* * *

(b) Certain Other Taxpayers Ineligible.--The standard deduction shall not be allowed in computing the taxable income of--

(1) a nonresident alien individual;

* * *

As the Tax Court noted (Op. 10), the above statutory language does not contain the specific expression "at any time during the taxable year" as does, e.g., Section 6013(a)(1), supra.

^{6/} See also Section 6013(a)(2), wherein, while manifesting its awareness of the short taxable year provisions of Section 443(a) and their impact upon the provisions of Section 6013(a), the Congress nevertheless found nothing incompatible between that and the concept in Section 6013(a)(1) of a taxable year which included a period of nonresident alien status.

Nevertheless, it concluded that such meaning must be imputed to the provision. The Commissioner has so interpreted the statute in published revenue rulings. Rev. Rul. 64-60, 1964-1 Cum. Bull. (Part 1) 84; Rev. Rul. 74-239, 1974-1 Cum. Bull. 372; Rev. Rul. 73-62, 1973-1 Cum. Bull. 57, 58. Under that consistent construction, the instant taxpayers, having been nonresident aliens for the first several months on 1971, are not entitled to use the standard deduction in computing their tax liability for that year.^{7/}

Taxpayers do not actually take issue with the "at any time" reading of the Commissioner and the court below. That is, they do not contend that Section 142(b)(1) should be read as requiring nonresident status for some minimum period during the year or during some particular part (e.g., the beginning or the end) of the year. Indeed, they seem to acknowledge that their situation from January through April of 1971 meets the test of Section 142(b)(1) insofar as nonresident status is concerned. Their position is based on the contention that the statute imposes a further condition--that, in order for the proscription of Section 142(b)(1) to become effective, the nonresident alien must also have been a "taxpayer" in the sense that he received some United States source income during the

^{7/} This treatment is supported by the holding of the Tax Court in Baddock v. Commissioner, 27 T.C.M. 289 (1968).

part of the taxable year in which he was a nonresident alien. Specifically, with respect to the situation of part year nonresidency, the difference between the Commissioner's position and that of taxpayers is that the Commissioner reads the statute as barring any use of the standard deduction for that year (even with respect to income earned during the period of residency) while taxpayers read it as barring only use of the standard deduction in connection with the United States source income, if any, received during the period of nonresidency. In short, the Commissioner interprets the bar of the statute as going to persons whereas the taxpayers read it as going only to specified portions of the income received by such persons. Assuming that the specific language of Section 142(b)(1) itself is ambiguous in that respect, the ambiguity is resolved by considering the language of the caption of Section 142 which states that certain "Individuals"--not income--are being made ineligible for the standard deduction. In the same vein, the heading of Section 142(b) reads "Certain Other Taxpayers Ineligible", again making clear that the disqualification extends to the taxpayer and not merely to certain portions of income he may have received during the year. We cannot believe that taxpayers would seriously assert that this language contemplates that a person can be two different taxpayers within his same taxable year--one a nonresident alien taxpayer (during his period of nonresidency) and the other a resident alien taxpayer--with the provisions of Section 142(b)(1) referring only to the former. In any

event, the best that can be said on behalf of taxpayers with respect to this is that the statute is ambiguous.^{8/} In such situations, the Supreme Court has held that great deference should be given to the rulings of the Internal Revenue Service, which is charged with administration of the statute, and that these rulings should be sustained even though there may be another reasonable reading which the court might think preferable. United States v. Correll, 389 U.S. 299, 306-307 (1967); Gino v. Commissioner, 538 F. 2d 833 (C.A. 9, 1976). cert. denied, November 29, 1976; see Udall v. Tallman, 380 U.S. 1, 16 (1965).

Taxpayers' reading of Section 142(b)(1) again is based upon an artfully attenuated conception of the function of the word "taxpayer". We note first that the word does not appear in paragraph (1), with which we are here concerned, but in the preliminary language of Section 142(b) ("Certain Other Taxpayers Ineligible"). But, as shown in connection with the issue discussed in Point B, supra, this reference is nothing but a recognition of the fact that no one who was not already established as one required to file a return (i.e., a taxpayer) would be affected by the provisions of the section which applies only to a taxpayer. Of moment is the fact that the expression used in Section 142(b)(1) itself is not "nonresident alien taxpayer", as taxpayers' reconstruct it (Br. 14), but "nonresident alien individual." It is inconceivable that, if Congress had actually intended the abstruse inference which

^{8/} The Tax Court found it so (Op. 11).

taxpayers seek to distill from the word "taxpayer", it would have obscured its meaning further by substituting the word "individual" at the most critical point--i.e., in subsection (b)(1) itself.

Taxpayers' formulation misses the point of the standard deduction provision and the reason for its disallowance in the case of a nonresident alien. The standard deduction is an arbitrary allowance of a certain percentage of a taxpayer's adjusted gross income in lieu of an itemization of his actual expenditures of the types made deductible by the Code. It is designed to reflect an assumed average relationship between the income level of a taxpayer for the entire year and an assumed level of expenditures for deductible items. Having determined the standard deduction on this basis, the Congress further determined that it would be available only in the run of the mill situation on which it was based--i.e., a return reflecting the taxpayer's total income receipt for the year which would be taxed according to the usual rules and rates of the Code.^{9/} Because nonresident alien status during all or part of a given taxable year was likely in many cases to remove the situation from this normal pattern of taxation--i.e., because all or part of the taxpayer's actual income for the year (that from non-United States sources) would be exempt from United States taxation--use^{10/}

^{9/} See the reference in taxpayers' brief (p. 14) to S. Rep. No. 885, 78th Cong., 2d Sess., p. 22 (1944 Cum. Bull. 858, 876).

^{10/} Cf. Section 142(b)(2) which names as one of the classes of taxpayers denied use of the standard deduction those United States citizens permitted, under the provisions of Section 931, to report only United States source income.

of the standard deduction was prohibited to all taxpayers who were nonresident aliens during the year.^{11/}

We do not doubt that the Congress could have handled the matter differently in some respects. That is, it could have tailored the prohibition more precisely so as not to bar use of the standard deduction by nonresident aliens in certain specific situations which represented little or no likelihood of significant variation from usual taxing patterns--e.g., where all or most of the nonresident's income was from United States sources of a business nature within the coverage of Section 871(b).^{12/} Or, it could have put the matter on a case by case basis, denying the deduction only where the taxpayer was unable to show that its use would not result in a significant variation from the usual taxing pattern.^{13/} However, in the exercise of its legislative discretion--probably mindful of the many special provisions governing the taxation of the income of nonresident aliens and the resulting difficulties of the tailored approach--

^{11/} If indeed the standard deduction is intended to represent a percentage relationship to the taxpayer's reportable income, the instant taxpayers (none of whose income during their nonresidency was reportable on their 1971 returns) are a more likely target of Congress' intended disqualification than the class of non-residents (those who have some income subject to United States taxation) which the taxpayers contend are the only targets.

^{12/} Interestingly, it is this type of income which, within taxpayers' theory, is most certainly to be denied use of the standard deduction.

^{13/} But none of this would have helped the instant taxpayers who, we submit, represent a classic example of a variation from the usual pattern where all of the taxpayer's annual income is reported for United States tax purposes.

it chose to deal with the matter broadly by withholding the option to use the standard deduction in any case where the taxpayer had been a nonresident alien during the year.^{14/}

Taxpayers' effort to justify their use of the standard deduction on a base consisting of the portion of their 1971 income which they earned as United States residents (Br. 16) is unsound for two reasons. First, they are in error in suggesting that, with their base so limited, they are not within the class of situations where their tax liability would be determined by some standard other than the general gross income provisions. The general income provisions contemplate application of the progressive scale of taxation (Section 1 of the Code) to a taxable income determined by reference to the taxpayer's entire actual income for the year. Here, the usual pattern would not obtain because a very substantial part of taxpayers' 1971 income (the part earned in the Phillipines between the beginning of the year and their departure on May 2, 1971) escaped United States taxation. Moreover, even the reported portion was taxed at a lower rate in the progressive structure than would have been the case had they earned their entire 1971 income in

^{14/} We point out that this is not a case where the taxpayers are being denied the right to deduct any actual expenditures for purposes which the Code makes deductible. The taxpayers are entitled--and we assume they were allowed--to take a standard deduction of every dollar of such expenditures during their period of residency which they could substantiate. What taxpayers are complaining about here is the denial of the right to take a standard deduction, which we assume would have been in excess of their actual expenditures for deductible purposes or they would not be litigating the matter.

this country and thus been required to report it all on their return.

We note in connection with the above that the taxpayers point to nonresident aliens who received United States source income from business activities as being the ones intended to be barred from use of the standard deduction by Section 142(b)(1). Yet such individuals can make the same argument as taxpayers and, in some instances, with more equitable appeal. Under Section 871(b) and 873, income of the stated nature is taxed in the same manner as that of residents and citizens. Thus, as strong a case can be made for allowing such nonresidents to take the standard deduction on a base consisting of the income earned while resident, plus their Section 871(b) income earned while nonresident, as taxpayers can make for using a base consisting of their income earned as a resident. And, the case of the Section 871(b) taxpayer is in fact stronger to the extent that, all other things equal, at least a part of their income earned while nonresident is taxable.^{15/} Thus, taxpayers cannot validly argue that the Congress must be deemed to have intended to exempt their situation from the reach of Section 142(b)(1) while conceding that it intended to cover within it taxpayers who, while nonresident, received Section 871(b) income.

^{15/} Indeed, in the case of the taxpayer who, while nonresident, earned all of his income from United States business sources, his tax liability would be, other than for the inability to use the standard deduction, likely to be just what it would have been had he been resident for the entire year.

Finally, the Tax Court pointed out (Op. 12) that the examples of the computation of the liability of dual status taxpayers set out in Treasury Regulations on Income Tax (1954 Code, Section 1.871-13(a)(1)), reflect the use of the specific or itemized deduction method, rather than the standard deduction, in situations where the latter would have been more favorable to the taxpayer. From this it concluded, reasonably, that it was not within the contemplation of the Regulations that a dual status taxpayer be permitted to use the standard deduction in the year in question. This analysis strongly buttresses the considerations outlined above in support of the Commissioner's interpretation.^{16/}

16/ Taxpayers do not indicate serious reliance upon the preliminary observation of the Tax Court (Op. 11-12) that the language of Section 1.871-13(a)(1), taken alone, would seem to support taxpayers' position because it recites that the tax liability of a dual status alien will be computed under two different sets of rules, "one relating to resident aliens for the period of residence." We do not believe this to be a valid conclusion in that it appears to be based on the assumption that the rules governing resident aliens permit use of the standard deduction in all cases. The very issue at bar is whether that is so. The Commissioner's position is that the rules governing the tax liability of a resident alien permit use of the standard deduction only when he was resident for the entire taxable year but deny its use to a taxpayer who was nonresident for part of the year. If that is correct, then that dichotomy would be part of the set of rules referred to in the cited provision of the Regulations and would bar use of the standard deduction in computing the tax liability for the period of residency. Nothing in the language of the Regulations is inconsistent with this.

II

THE TAX COURT WAS NOT CLEARLY ERRONEOUS
IN FINDING THAT TAXPAYERS' MOVE FROM
MANILA TERMINATED IN SAN FRANCISCO

Section 217(a), Appendix, infra, provides that a taxpayer is entitled to deduct the expenses of moving to a new principal place of work. However, Section 217(c)(2), Appendix, infra, limits the deduction to situations where the taxpayer is a full-time employee for at least 39 weeks during the 12 month period immediately following his arrival at his new principal place of work. Taxpayers contend that their stay in San Francisco was a mere temporary stopover and that their intended principal place of work was New York City. If correct they are entitled to the deduction. But, the Tax Court found (Op. 14-14a) that San Francisco, not New York, was taxpayers intended new principal place of work when they left Manila and thus they do not qualify for the deduction.

As taxpayers contend (Br. 22), this is an issue of fact. Hence, the Tax Court's findings are not to be set aside unless clearly erroneous, particularly since the question is one of subjective intentions and turns largely on the credibility of a witness. Fleischer v. Commissioner, 403 F. 2d 403, 405-406 (C.A. 2, 1968); Crown Iron Works Co. v. Commissioner, 245 F. 2d 357, 360 (C.A. 8, 1957). The only support in the record for taxpayers' assertion that San Francisco was intended as a mere stopover and that New York was at all times their intended destination and principal place of work was the subjective and

self-serving testimony of taxpayer, Severino Nico. It is established law that the court was not bound to believe such testimony, at least where the objective facts suggest the contrary, as is the case here. Fleischer v. Commissioner, supra, p. 406; Braunstein v. Commissioner, 305 F. 2d 949, 952 (C.A. 2, 1962). The Tax Court obviously, and understandably, did not find Severino's testimony credible.

The documentary evidence pointed to by taxpayers (Br. 23)-- that their belongings were shipped to them in San Francisco by boat and that they received their retirement contributions there--scarcely supports their contention that New York was their destination and, in fact, suggests the contrary.

Taxpayers fail to recognize that the burden of proof was on them to prove that they intended New York to be their new principal place of work when they left Manila. Helvering v. Taylor, 293 U.S. 507, 515 (1935). Thus, they seem to rely (Br. 24-25) on the contention that there is no evidence in the record that they initially intended to make San Francisco their new place of work. Even if well founded, this would not avail them since, in order to justify reversal of the trial court's findings, it is their burden to show record evidence which affirmatively compels the conclusion that New York was their intended place of work. If the record evidence does not compel either the affirmative or the negative of this proposition, the Tax Court's findings must be sustained.

Moreover, the objective evidence strongly supports the Tax Court's conclusion and discounts the credibility of Severino's testimony. He has suggested no logical reason for stopping off at San Francisco for several months if New York was their actual destination. Assuming that the cost of shipping their belongings by plane was too great and that freight carrying boats from Manila go only to Los Angeles and San Francisco^{17/}, this did not require that taxpayers themselves stop in San Francisco to await their arrival there. It is surely beyond belief--at least without some verification--that it is not possible to ship freight directly from Manila to New York other than by air. Although the initial leg by boat may be from Manila to the west coast, there are certainly facilities for routing the shipment on through to New York by train, truck or another boat without personal handling in San Francisco by the original sender. Nor can taxpayers seriously expect the Court to believe that the money and the alien registration cards they were awaiting could not as well have been sent to them in New York as in San Francisco. Also, taxpayers have not explained the fact that they remained in San Francisco until the end of August (Op. 4) although their belongings arrived there on May 17 (Op. 3).

Had taxpayers asserted that they stopped over in San Francisco for recreation, sight-seeing or visiting of relatives,

17/ Taxpayers offered nothing in support of this but Severino's statements.

etc., the issue might have been a closer one. But the contention that they were compelled to stop over there to await their belongings, money, etc., and that this was their sole reason, is little short of preposterous and the Tax Court was certainly not compelled to give it credence.

CONCLUSION

For the above reasons, the decision of the Tax Court was correct and should be affirmed.

Respectfully submitted,

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AUGUST, 1977.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on the Appellants, appearing pro se, by mailing four copies thereof on this 24th day of August, 1977, in an envelope, with postage prepaid, properly addressed to them as follows:

Severino R. Nico, Jr.
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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 217 [as added by Sec. 213(a)(1), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19]. MOVING EXPENSES.

(a) [as amended by Sec. 231(a), Tax Reform Act of 1969, P.L. 91-172, 83 Stat. 487] Deduction Allowed.-- There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee or as a self-employed individual at a new principal place of work.

* * *

(c) [as amended by Sec. 231(a), Tax Reform Act of 1969, supra] Conditions for Allowance.--No deduction shall be allowed under this section unless--

* * *

(2) either--

(A) during the 12-month period immediately following his arrival in the general location of his new principal place of work, the taxpayer is a full-time employee, in such general location, during at least 39 weeks, or

(B) during the 24-month period immediately following his arrival in the general location of his new principal place of work, the taxpayer is a full-time employee or performs services as a self-employed individual on a full-time basis, in such general location, during at least 78 weeks, of which not less than 39 weeks are during the 12-month period referred to in subparagraph (A).

* * *

SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

(a) Joint Returns.--A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions, except as provided below:

(1) no joint return shall be made if either the husband or wife at any time during the taxable year is a nonresident alien;

(2) no joint return shall be made if the husband and wife have different taxable years; except that if such taxable years begin on the same day and end on different days because of the death of either or both, then the joint return may be made with respect to the taxable year of each. The above exception shall not apply if the surviving spouse remarries before the close of his taxable year, nor if the taxable year of either spouse is a fractional part of a year under section 443(a)(1);

* * *





UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

August 24, 1977

Address Reply to the
Division Indicated
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5-13658

A. Daniel Fusaro, Esquire
Clerk, U. S. Court of Appeals
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New York, New York 10007

Re: Severino R. and Teresita V. Nico v.
Commissioner (C.A. 2 - No. 77-4090)

Dear Mr. Fusaro:

We are transmitting herewith for filing with your Court ten copies of the brief on behalf of the Appellee in the above-entitled case.

We are forwarding four additional copies to Appellants, appearing pro se, together with a copy of this letter.

Sincerely yours,

M. CARR FERGUSON
Assistant Attorney General
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By:

Gilbert E. Andrews
GILBERT E. ANDREWS
Chief, Appellate Section

Enclosure

cc: Severino R. Nico, Jr.
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